Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 743

DANIEL P. WOOLLEY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ELDEN MCFARLAND,
618 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
ELLWOOD W. KEMP, JR.,
420 Lexington Avenue,
New York, N. Y.

GEORGE A. DONOHUE,
295 Madison Avenue,
New York, N. Y.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Daniel P. Woolley, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on August 15, 1941.

Opinions Below.

The opinion of the United States Board of Tax Appeals is reported at 39 B. T. A. 802 (R. 14). The opinion of the Circuit Court of Appeals is reported in 122 Fed. (2d) 167 (R. 77).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 15, 1941 (R. 81). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

In 1933 petitioner created a trust, naming his wife, Ethel Y. Woolley, trustee and naming his infant nephew, Robert W. Gardner, Jr., his wife and himself as contingent beneficiaries. On June 19, 1934, he executed supplementary documents terminating the trust as of January 1, 1937, and relinquishing all power of revocation. The question presented is whether the trust income for that portion of the year subsequent to June 19, 1934, is taxable as the grantor's income under Section 22(a) of the Revenue Act of 1934.

Statutes Involved.

The pertinent statutes involved are set forth in the appendix, infra, pages 10-11.

Statement.

The facts as found by the Board of Tax Appeals (R. 14-25) are in substance as follows: On February 10, 1933, petitioner transferred property in trust, naming his wife, Ethel Y. Woolley, sole trustee. Under the trust instrument the trustee was empowered to take control and management of the trust property and to invest and reinvest the same and to receive the income therefrom, and after paying the reasonable and proper expenses of the trust to pay and distribute the principal thereof and the income therefrom as follows:

> (a) During the life of the settlor, to pay over and distribute the whole or any part of the net income

thereof annually, in such amounts and proportions as the trustee might in her sole, absolute and uncontrolled discretion determine, to and among one or more of the following, in accordance with their respective needs, of which she should be the sole judge, namely:

The Settlor,
Robert W. Gardner, Jr., of Asheville, North Carolina, infant nephew of the settlor,
Ethel Y. Woolley, wife of the settlor,
and to accumulate the balance of such net income, if any, for the benefit of such of the above named persons who were infants at the time of such accumulation; such income so accumulated to be paid over to the person for whose benefit it was accumulated upon his attaining the age of 21 years. The nephew, Robert W. Gardner, Jr., was the only minor beneficiary.

(b) Upon the death of the settlor to pay over to the estate of the settlor the principal amount of the trust.

The trust instrument also provided that the trustee might hold as an investment any property coming into her hands under the trust, and provided further that if the settlor should notify the trustee in writing, directing the sale or leasing of any property or the purchase of any property, the trustee should lease or sell such property or should purchase out of the funds of the trust such property as the case might be. The trust instrument provided, however, that such sale or such purchase should be at the fair market value of such property. The trust instrument also provided that the trust could be revoked in whole or in part by the settlor by an instrument in writing, executed after December 31, 1933.

On June 19, 1934, petitioner, by an instrument in writing, elected to terminate the trust as of January 1, 1937, and

on the same day, by another instrument in writing, petitioner relinquished all right of revocation of the trust.

The Board found that "none of the trust income for the period June 19 to December 31, 1934, which is here in controversy, was 'properly paid or credited during * * * (1934) to any beneficiary' ".

The Board held that from June 19, 1934, the trust was irrevocable, terminating, by its terms, on January 1, 1937, and therefore the trust income was not taxable as the grantor's income under Section 166 of the Revenue Act of 1934.

The Board further found that the interest of Ethel Y. Woolley constituted "a substantial adverse interest to that of the settlor" and held that the trust income was not taxable as the grantor's income under Section 167 of the Revenue Act of 1934.

The Board then found that the grantor was not in substance the owner of the trust corpus and held that the respondent's contention that the petitioner did not divest himself of control of the corpus of the trust, other than by power of revocation, so as to preclude its taxability to him as grantor, was without merit; and that the income of the trust from June 19 to December 31, 1934, was properly taxable to the trust for that year and not to the grantor, the petitioner here.

The case was reviewed and approved by the entire Board without dissent (R. 25).

Respondent filed a petition for review by the Circuit Court of Appeals for the Second Circuit. The Circuit Court reversed the Board, holding that the grantor was in substance the owner of the trust corpus, and that the income of the trust was taxable as the grantor's income under the rule announced by the Supreme Court in the *Clifford* case.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In not following the determination of the Board of Tax Appeals that the grantor was not in substance the owner of the trust corpus during said period;

2. In holding that the income of the trust for the period beginning June 19 and ending December 31, 1934, was taxable as the grantor's income under Section 22(a) of the Revenue Act of 1934;

3. In not holding that the Commissioner had waived reliance upon Section 22(a).

Reasons for Granting the Writ.

This case presents three important questions of federal taxation of trust income, which have been decided in a way probably in conflict with the decisions of this Court, namely:

1. Whether the determination of the Board of Tax Appeals that the grantor of a trust did not remain in substance the owner of the trust corpus is determinative of that question on review when supported by substantial evidence;

2. Whether, when at the hearing before the Board the Commissioner specifically announced his reliance solely upon Sections 166 and 167 of the Revenue Act of 1934, he may subsequently change his position to claim reliance upon Section 22(a) of the Act; and

3. Where the trial was had solely upon the theory of taxability under Sections 166 and 167, whether the appellate court may determine that the grantor remained in substance the owner of the trust corpus, and that the income is taxable as his income under Section 22(a).

(1) This Court indicated in its opinion in the *Clifford* case, 309 U. S. 331, at page 336, that the question of whether the control retained by the grantor constituted ownership

for the purposes of Section 22(a) was a question of fact which was primarily a matter for determination by the Board. It said that inasmuch as the Board's finding in that case was based upon substantial evidence, it could not be said that the "triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of Section 22(a)".

The appellate courts have been groping for the rationale of the *Clifford* case ever since its promulgation. In *Commissioner* v. *Branch,* 114 Fed. (2d) 985, the Circuit Court of Appeals for the First Circuit thought that this Court in the *Clifford* case regarded the question as one of fact. But it expressed some doubt as to whether the question was purely a question of fact. In *Helvering* v. *Palmer,* 115 Fed. (2d) 368, the Circuit Court of Appeals for the Second Circuit affirmed the Board's decision per curiam upon authority of the *Branch* case. But in *Helvering* v. *Abraham,* 115 Fed. (2d) 368, the Second Circuit reversed the Board, per curiam, upon authority of the *Clifford* case, although the Board of Tax Appeals had made no finding as to whether the grantor did or did not remain in substance the owner of the trust corpus.

In *White* v. *Higgins,* 116 Fed. (2d) 312, the Circuit Court of Appeals for the First Circuit, again commenting upon the *Clifford* case, stated that the Supreme Court "seems to regard the basic issue whether the grantor remains in substance the owner of the trust corpus as a question of fact, calling for appropriate finding by the trier of fact".

In *Commissioner* v. *Berolzheimer,* 116 Fed. (2d) 628, the Circuit Court of Appeals for the Second Circuit, after some discussion, concluded that while the question was one primarily for the Board's determination, nevertheless that determination was subject to judicial review.

And in the present case the Court reversed the Board upon authority of the *Clifford* case, apparently assuming, without any discussion on the point, that the Board's finding was subject to judicial review, regardless of whether supported by substantial evidence.

On the other hand, in *Commissioner* v. *Central National Bank of Cleveland,* 119 Fed. (2d) 470, the Circuit Court of Appeals for the Sixth Circuit took the view that the Board of Tax Appeals was entrusted with exclusive authority to determine whether the grantor remained in substance the owner of the trust corpus; and remanded the case to the Board for further hearing and determination.

The Board's finding in the present case is supported by substantial evidence, despite the fact that the issue of taxability under Section 22(a) was waived at the time of hearing (R. 47-49). The grantor here was not the trustee; the trustee not only had power and control over the trust income and corpus but she exercised that power; her demeanor on the stand supported her declaration of independent power and control; she exercised her discretion over the distribution of the income, distributing part for the benefit of their nephew, who was not a member of their household or immediate family*; and the grantor in fact exercised no power of control over either the trust corpus or income.

This case, therefore, presents the question of whether the Board's finding is one of fact or whether it is a determination subject to judicial review, even though supported by substantial evidence. The question is a recurring one, which has been variously answered in the different appellate decisions. It is of sufficient general importance to warrant determination by this Court.

Moreover, if it can be said that the *Clifford* case does hold that the question is one of fact,** petitioner submits that the decision in the present case is in conflict with the *Clifford* case.

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* The nephew's father and mother were living and were financially able to maintain and support him. Petitioner had no moral or legal obligation to provide for him. Nor did he live with petitioner or in petitioner's household during or prior to the taxable year.

** As pointed out above, the Circuit Court of Appeals for the First Circuit so interpreted the *Clifford* case in *White* v. *Higgins,* 116 Fed. (2d) 312.

(2) In *Helvering* v. *Wood,* 309 U. S. 637, 60 S. Ct. 807, this Court held that inasmuch as the Commissioner had definitely excluded all contentions other than taxability under Section 166 before the appellate court, the question of taxability of trust income to the grantor under Section 22(a) could not be raised for the first time on petition for certiorari.

At the time of trial in the present case, the Board member asked for a specific declaration of the basis for the Commissioner's contentions. Counsel for the Commissioner and for the taxpayer agreed specifically that the only issue as to taxability was based upon Sections 166 and 167 of the Revenue Act of 1934 (R. 48). The trial was had upon that theory.

Is not such a waiver fully as effective as that in the *Wood* case, and for the reasons there stated? The two waivers were substantially the same except that in the *Wood* case the section upon which sole reliance was placed was Section 166, whereas in the present case sole reliance was specifically limited to Sections 166 and 167. The *Hormel* and *Richter* cases* are not in point inasmuch as there was in those cases no specific waiver.

If the *Wood* case, supra, is controlling, and petitioner respectfully submits that it is, the Court's decision in the present case is in conflict therewith.

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* *Hormel* v. *Helvering,* 312 U. S. 552; *Helvering* v. *Richter,* 312 U. S. 561.

Conclusion.

This case presents the questions:

1. As to whether the Circuit Court of Appeals should have accepted the Board's determination that the grantor did not remain in substance the owner of the trust corpus; and

2. Whether, by his waiver at the time of trial, the Commissioner is foreclosed from relying upon the broader ground of Section 22(a).

Petitioner submits that these questions are of general importance and that the action of the Circuit Court of Appeals is probably in conflict with the decisions of this Court in similar cases; and therefore this petition should be granted.

Respectfully submitted,

ELDEN MCFARLAND,
618 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

Of Counsel:

ELLWOOD W. KEMP, JR.,
420 Lexington Avenue,
New York, N. Y.

GEORGE A. DONOHUE,
295 Madison Avenue,
New York, N. Y.

APPENDIX.

Revenue Act of 1934, c. 277, 48 Stat. 680:

Sec. 22. GROSS INCOME.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(U. S. C., Title 26, Sec. 22.)

Sec. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor.

(U. S. C., Title 26, Sec. 166.)

Sec. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o) relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question.

(U. S. C., Title 26, Sec. 167.)

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 743

DANIEL P. WOOLEY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 20–25) is reported at 39 B. T. A. 802. The opinion of the United States Circuit Court of Appeals (R. 77–80) is reported at 122 F. (2d) 167.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 15, 1941 (R. 81). The petition for a writ of certiorari was filed November 14, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the income of a short-term trust for the benefit of the settlor, his wife, and nephew was taxable to the settlor under Section 22 (a) of the Revenue Act of 1934, he having retained the reversion and certain powers of control and having appointed his wife the sole trustee.

2. Whether in the circumstances the Commissioner waived reliance upon Section 22 (a) by not invoking it before the Board.

3. Whether, if the Circuit Court of Appeals erred in holding the settlor taxable under Section 22 (a), he was not, in any event, properly taxed under Section 167 (a) (2).[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statute involved are set out in the Appendix, *infra*, pp. 10–11.

STATEMENT

The facts, as found by the Board (R. 15–20) and shown by the evidence, may be stated as follows:

On February 10, 1933, petitioner transferred certain property in trust to his wife, as trustee.

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[1] The applicability of Section 167 (a) (2) was not passed upon by the court below and is not considered in the petition. Hence we do not discuss it herein. Should the petition be granted, however, we will urge it as an alternative ground supporting the decision upholding the tax.

Under the trust (R. 52–58), which was to terminate upon petitioner's death, she was to take control of the property, invest and reinvest it, and receive the income. She was to distribute all or part of the net income to petitioner, to an infant nephew of petitioner, or to herself, in such amounts in accordance with their needs as she, in her discretion, might determine, and to accumulate the balance, if any, for the benefit of the nephew, to be paid to him upon his attaining the age of 21, or, if he should die before, to his heirs. Upon termination of the trust, the principal and any additions thereto were to be paid over to petitioner's estate. (R. 15–16, 52–54.)

The trust provided that petitioner could revoke it in whole or in part after December 31, 1933. It also provided that upon written notice from him directing the sale or lease of any of the trust property, the trustee should sell or lease the same, and that, upon similar notice, the trustee should make any purchases or investments which petitioner might direct, provided, however, that such sales or purchases be at a price equal to the fair market value. In addition, petitioner reserved the right at any time to substitute for the property constituting the principal of the trust "any other investments, securities, or property that he may wish," if of equal market value at the time, and the right to appoint a successor trustee in the event that his wife should die or resign prior to the termination of the trust (R. 16–18, 54–55).

On June 19, 1934, petitioner wrote a letter to his wife as trustee, notifying her that he was revoking the trust, "said revocation to effect a termination of said instrument and of said trust as of January 1, 1937" (R. 18, 61–62). She acknowledged receipt of the letter and of the fact that the trust would terminate on the date specified (R. 18, 62). Also on June 19, 1934, petitioner entered into an agreement with his wife whereby, in consideration of the payment of $100 by her, he agreed to relinquish any right which he might have to revoke the trust on or before January 1, 1937 (R. 18–20, 59–61). The following day, by letter to her, he relinquished any possibly remaining right he might have "by further revocation or in any other manner" to cause the trust to terminate earlier than January 1, 1937 (R. 20, 63–64).

In his return for 1934 petitioner reported the income which accrued from January 1 to June 19, 1934, the date when he surrendered the power to revoke, and there was no dispute as to his taxability for that period. The income from June 19 to December 31, 1934, amounting to $11,926.71, which alone is in controversy, was reported by the trust, having been accumulated by the trustee and not been paid or credited to any beneficiary during the year (R. 20, 42–43).

The Commissioner transferred the latter amount of income to petitioner and assessed a deficiency (R. 10, 42–43, 67, 71–73). Thereafter, on April

29, 1939, which was prior to the decision of this Court in *Helvering* v. *Clifford,* 309 U. S. 331, the Board of Tax Appeals held that the income in question was not taxable to petitioner under Sections 166 or 167 of the Act, or under the theory of substantial ownership, as contended by the Commissioner (R. 20–25).

On review in the court below, subsequent to this Court's decisions in the *Clifford* case and in *Helvering* v. *Wood,* 309 U. S. 344, the Commissioner abandoned his reliance upon Section 166 and contended that the income was taxable to petitioner under Section 22 (a) and, in any event, under Section 167 (a) (2). The court sustained the Commissioner's contention based upon Section 22 (a) and reversed the order of the Board with directions to reinstate the deficiency determined by the Commissioner. The court did not pass upon the argument based on Section 167 (a) (2) (R. 77–81).

ARGUMENT

In view of the shortness of the term of the trust as revised, of the intimate family beneficiaries,[2] including petitioner, of petitioner's reversion, of his express powers of control, and of the added fact that the trustee was his wife who, it would be expected, in managing the principal and distributing the income, normally would be responsive

[2] Petitioner testified that after the execution of the trust he and his wife adopted his nephew and that the latter was living in their household (R. 45).

to his wishes, if not wholly guided by them, there can be no doubt of the applicability of Section 22 (a) within the rule of the *Clifford* case. Our brief in opposition to the pending petition for certiorari in *Barbour* v. *Helvering,* No. 727, this Term, shows that a settlor may be taxed under Section 22 (a) though he reserves no express powers of control and is not a beneficiary and though the trust be for a term longer than that here involved.

1. Petitioner does not contend that there are any controlling differences between the instant trust and that in the *Clifford* case. But he argues (Pet. 5–7) that the question whether he was the owner of the corpus so as to be subject to Section 22 (a) was determined in his favor by the Board and that such determination was one of fact and hence was conclusive on the court below since supported by substantial evidence.

Although the Board did not mention Section 22 (a) or make any express finding that petitioner was not the owner of the corpus, it did overrule the Commissioner's contention to the effect that petitioner was the substantial owner and for that reason taxable (R. 24–25). That determination, however, was not conclusive on the court below. The question of ownership for purposes of Section 22 (a) is at least a mixed question of fact and law, and while the reviewing court must accept the evidentiary and circumstantial facts as found by the Board, provided the findings are supported by sub-

stantial evidence, it may reach its own conclusion on the legal issue whether, upon those facts, not here disputed, the settlor is to be regarded as the taxable owner. See *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481; *Hormel* v. *Helvering*, 312 U. S. 552; *Helvering* v. *Richter*, 312 U. S. 561; *Bogardus* v. *Commissioner*, 302 U. S. 34. No conflict is alleged on this point.[3]

Even if the Board's determination were to be treated as a finding of fact, the court below could not be held to have erred. For in view of the decisions in the *Clifford*, *Hormel*, and *Richter* cases, the evidence relied on by petitioner (Pet. 7) as tending to show that he had divested himself of ownership is immaterial. Cf. *United States* v. *Pyne*, 313 U. S. 217.

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[3] This Court's statement in the *Clifford* case (309 U. S. at 336), "we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22 (a)", cannot properly be construed to mean that the question is one of fact in the sense that the Board's ultimate finding, if supported by substantial evidence, is conclusive. Neither in *Commissioner* v. *Branch*, 114 F. (2d) 985 (C. C. A. 1st), nor in *White* v. *Higgins*, 116 F. (2d) 312 (C. C. A. 1st) did the court so apply the statement; in the latter case the taxes were upheld under Section 22 (a) despite the absence of Board findings on the issue. In *Commissioner* v. *Central Nat. Bank*, 119 F. (2d) 470 (C. C. A. 6th), the court simply remanded the proceeding for rehearing to permit the introduction of evidence on the question, pursuant to this Court's dispositions in the *Hormel* and *Richter* cases, *supra*. It did not hold or intimate that the Board's determination would be conclusive.

2. Petitioner also contends (Pet. 5, 8) that the Commissioner waived reliance upon Section 22 (a) at the hearing before the Board and that, therefore, under the decision in *Helvering* v. *Wood,* 309 U. S. 344 (inadvertently cited 637), the court below erred in applying the Section. In the *Wood* case (pp. 348–349) this Court refused to consider whether the tax there involved was valid under Section 22 (a) since in his brief before the circuit court of appeals the Commissioner had expressly waived reliance upon any section other than Section 166. Here, however, there was no such waiver. The applicability of Section 22 (a) was fully urged to the court below in the brief for the Commissioner, and, although it had not been specifically relied on before the Board, it had not been renounced.[4] Thus the court was correct in considering it. *Hormel* v. *Helvering, supra; Helvering* v. *Richter, supra.* This would seem especially true where as here the taxpayer does not contend that he had no opportunity to meet the issue before the Board or that the Board did not make findings on the question, but urges (Pet. 5–7), on the contrary, that the Board's findings were in his favor and were conclusive.

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[4] The statements (R. 47–49) of the Commissioner's counsel before the Board, referred to by petitioner (Pet. 7), to the effect that Sections 166 and 167 were relied on in support of the tax, did not constitute a waiver of reliance upon Section 22 (a). The latter was not mentioned.

CONCLUSION

The decision below correctly follows the controlling decisions of this Court. There is no conflict of decisions, and no question calling for any further review by this Court. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
J. LOUIS MONARCH,
Acting Assistant Attorney General.
HARRY MARSELLI,
Special Assistant to the Attorney General.
H. G. INGRAHAM,
Attorney.

DECEMBER 1941.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(U. S. C., Title 26, Sec. 22.)

* * * * *

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called charitable contribution deduction);
then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

(U. S. C., Title 26, Sec. 167.)

U. S. GOVERNMENT PRINTING OFFICE: 1941